APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 23,908

RAILWAY LABOR EXECUTIVES ASSOCIATION, an unincorporated association; FRANK CARTHY; R. W. KROLL; W. A. STYMUS; F. E. HOLDEN; R. M. HESTER; J. R. BOND; W. COMSTOCK; and P. I. JENSEN, on their own behalf and on the behalf of all others similarly situated,
Plaintiffs-Appellants

v.

THE ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY,
Defendant-Appellee.

[June 23, 1970]

Appeal from the United States District Court
for the Central District of California

Before: ELY and WRIGHT, Circuit Judges, and JAMESON,* District Judge.

WRIGHT, Circuit Judge:

Appellant railway employees seek damages for loss of work resulting from the discontinuance of four interstate trains by their employer. They allege that the discontinuance did not comply with the procedures set out in Section 13a of the Interstate Commerce Act, 72 Stat. 571 (1958), 49 U.S.C. § 13a (1964).[1] Without determining its lawfulness,

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* Honorable William J. Jameson, United States Senior District Judge, Billings, Montana, sitting by designation.

[1] Section 13a, in brief, permits a railway carrier, desirous of discontinuing an interstate train route, to avoid the jurisdiction of state laws and regulatory agencies by filing a 30-day notice with, and securing the approval of, the Interstate Commerce Commission. The section also requires the posting of a notice of the proposed discontinuance in facilities served by the train "at least thirty days in advance of any such proposed discontinuance or change."

we affirm the judgment of the district court, holding that this dispute between the railroad and its employees is properly cognizable by the National Railroad Adjustment Board under provisions of the Railway Labor Act, 45 U.S.C. §§ 515-62.

On October 10, 1967, the defendant railroad filed with the Interstate Commerce Commission a statement of its intention to discontinue service on two trains running between Chicago and Los Angeles and two others running between Kansas City, Missouri, and Gallup, New Mexico. As required by Section 13a, notices were posted in the affected stations advising the public that operations would cease at midnight on November 10, 1967.

But on October 19, 1967, when the Interstate Commerce Commission notified the railroad that it would not investigate, and hence would not oppose, the proposed discontinuances, the railroad immediately cancelled the trains involved, twenty days prior to the date stated in the posted notices. Attempts by the plaintiff union to have the ICC restore the service proved unsuccessful and this class action was brought on behalf of the displaced employees. As amended, the complaint sought compensatory and punitive damages for the affected employees caused by the premature discontinuance. The district court denied relief.

It is conceded that this dispute is between a railroad and its employees, and that the two are linked by collective bargaining agreements. It is also undisputed that this is a "minor dispute" in the sense that "the claim is to rights accrued, not merely to have new ones created for the future." *Elgin, Joliet & Eastern Ry* v. *Burley*, 325 U.S. 711, 723 (1945).

Hence, the narrow question before us is whether the quarrel is one "growing out of grievances or out of the interpretation or application of [existing] agreements." If so, it must go first to conference and negotiation and, failing that, to possible arbitration before the National Railroad Adjustment Board. Railway Labor Act § 3, First (i), 45 U.S.C. § 153, First (i). The statutory grievance procedure,

if applicable, is mandatory and exclusive and deprives us of the primary jurisdiction to resolve the disputed questions. *Brotherhood of Locomotive Engineers* v. *Louisville & Nashville R.R.*, 373 U.S. 33, 38 (1963).

The jurisdiction of the adjustment Board is not limited to disputes arising from provisions specifically included in a collective bargaining agreement. If the claim is founded upon some incident of the employment relationship, or an asserted one, the Board may determine the meaning and effect of the provisions of the collective agreement with reference either to an included or to an omitted case. *Elgin, Joliet & Eastern Ry.* v. *Burley, supra,* 325 U.S. at 723.

Here the collective agreements make no specific provision for the payment of wages following discontinuance of a train. However, nothing in the agreements exclude such protection for the affected employees. Whether such a provision was omitted because the parties relied on the language of the Interstate Commerce Act, the "usage, custom, and practice" of the industry, or whether it was rejected following negotiation does not appear in the record and is a matter requiring the expertise of the Adjustment Board. *Order of Ry. Conductors* v. *Pitney,* 326 U.S. 561, 567 (1946). *See* also *Transportation-Communication Employees Union* v. *Union Pacific R.R.*, 385 U.S. 157, 160-61 (1966); *Gunther* v. *San Diego & Arizona Eastern Ry.*, 382 U.S. 257, 260-62 (1965). *Cf.*, Cox, The Legal Nature of Collective Bargaining Agreements, 57 Mich. L. Rev. 1 (1958).

A similar situation was presented in *Missouri-Kansas-Texas R.R.* v. *Brotherhood of Railroad Trainmen*, 342 F.2d 298 (5th Cir. 1965). The Brotherhood called a strike over the Railroad's failure to correct hazardous and unsafe conditions. The court held that the dispute was properly referable to the Adjustment Board despite the silence of the collective bargaining agreement as to any terms governing unsafe working conditions.

The employees seek to characterize this action as a "tort action" for violation of a statutory duty and, therefore, not referable to the Adjustment Board. But the provisions of

the Railway Labor Act relate to matters of substance, not form. *See Switchmen's Union of North America* v. *Southern Pacific Co.*, 398 F.2d 443, 447 (9th Cir. 1968). Where, as here, the dispute grows out of the employment relationship and, in the final analysis, involves an attempt to impose a right which is incident to that relationship, the statutory forum is the Adjustment Board, absent a clear expression of legislative policy to the contrary.

We do not think that the policies behind enforcement of Section 13a of the Interstate Commerce Act were intended to outweigh the single forum provisions of the Railway Labor Act. *Cf. Moe* v. *Eastern Air Lines, Inc.*, 246 F.2d 215 (5th Cir. 1957). Insofar as displaced employees are concerned, it is, at best, conjectural that Congress intended to confer upon them additional labor security rights independent of the collective bargaining agreement. And to hold that a railroad employer-employee dispute over rights asserted under the Interstate Commerce Act is outside the provisions of the Railway Labor Act would be directly contrary to the holding in *Order of Railroad Telegraphers* v. *Chicago & North Western Ry.*, 362 U.S. 330 (1960).

In *Railroad Telegraphers* the employer sought to avoid application of the Railway Labor Act by contending that the discontinuance of railroad stations was entrusted, by law, to state agencies. Required bargaining over job security, it was alleged, would subvert the authority of those agencies and would be contrary to transportation policies of the Interstate Commerce Act. The Court rejected these contentions, holding that the security, seniority, and stability of railroad jobs were proper subjects of collective bargaining.

It is true, as the employees contend, that the effect of our holding may require, to some degree, the interpretation of Section 13a by the Adjustment Board. But it will also involve the interpretation of much more, including past bargaining history, current industry practices, and the effect of the ruling upon future bargaining in the industry as a whole. These are matters entrusted to the Arbitration Board and we conclude that the district court correctly dis-

missed the suit for the employees' failure to exhaust those procedures.

Affirmed.

ELY, Circuit Judge (Concurring):

While I concur in the majority opinion, I note my disapproval of the appellee's noncompliance with section 13a of the Interstate Commerce Act. Choosing to effectuate discontinuance of its service under federal procedure, it bypassed state laws which would have imposed a longer delay than the relatively short period prescribed by Congress. Having thus invoked the federal law to its advantage, it should not, in my judgment, have terminated the service short of the expiration of the time prescribed by the federal statute. I think it clear that the appellee disregarded the law, and had relief been sought by parties to whom another avenue was unavailable, the appellee's position would hardly be supportable.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 23,908

Judgment

APPEAL from the United States District Court for the Central District of California

THIS CAUSE came on to be heard on the Transcript of the Record from the United States District Court for the Central District of California and was duly submitted.

ON CONIDERATION WHEREOF, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this Cause be, and hereby is affirmed, with costs in this Court in favor of the appellee and against the appellants.

Costs:

Brief of appellee: $341.37

Filed and entered June 23, 1970

APPENDIX B

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

Civil No. 67-1618-F

[Filed Jan. 14, 1969]

RAILWAY LABOR EXECUTIVES ASSOCIATION, an unincorporated association; FRANK CARTHY, ET AL., *Plaintiffs*

v.

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, *Defendant*

JOHN J. BALLUFF, ROBERT B. CURTISS, MATTHEW H. WITTEMAN, HENRY M. MOFFAT, RICHARD K. KNOWLTON, FREDERICK G. PFROMMER, DONALD W. RICKETTS, 448 Santa Fe Building, 121 East Sixth Street, Los Angeles, CA 90012 628-0111—Attorneys for Defendant.

Findings of Fact and Conclusions of Law

This action having been tried upon the agreed statement of facts of the parties hereto, as amended, by the court without a jury, the court, having heard the evidence and considered the written and oral arguments of the parties, hereby finds the facts and states separately the conclusions of law thereon and directs the entry of the appropriate judgment as follows:

FINDINGS OF FACT

The court finds as its findings of fact all the facts set forth in the Agreed Statement of Facts herein dated September 9, 1968, as amended by Amendment to Agreed Statement of Facts dated October 21, 1968.

CONCLUSIONS OF LAW

Upon the foregoing findings of fact the court concludes as follows:

Counts I and II

I

In discontinuing the operation of Trains 3, 4, 7 and 8 on or about October 19 and October 20, 1967, defendant did not violate 49 U.S.C. § 13 (a)(1), such statute being permissive in nature, defendant having the option of either proceeding under said statute or under the applicable state statutes and regulations, the effect of defendant's action in discontinuing said operations being to vitiate the jurisdiction of the Interstate Commerce Commission after it had originally invoked such jurisdiction by filing notices as contemplated by said statute.

II

Plaintiffs, being affected employees of defendant and a railway labor association representing such employees, had no legal standing to assert the alleged violation of said federal statute because the benefits of said statute are limited to the traveling and shipping public and do not enure to the benefit of employees of railroad carriers subject to said statute.

III

Plaintiffs' complaint represents a grievance arising out of the employment relationship between the individual plaintiffs and defendant which is exclusively referable to the National Railroad Adjustment Board under the provisions of the Railway Labor Act (45 U.S.C. § 153 et ff.)

Counts III and IV

IV

The requisite diversity of citizenship is not present to confer jurisdiction upon this court over Counts III and IV of said complaint.

V

There is no pendent jurisdiction of this court over Counts III and IV because said counts embrace a separate and distinct cause of action which is not the same as the alleged federal cause of action asserted in Counts I and II and because the court concludes that there is no cause of action in plaintiffs based upon said federal law.

VI

If the court could, in its discretion, entertain Counts III and IV on the basis of pendent jurisdiction it declines to entertain such counts as being predicated solely upon state law and which should be determined by the court of the State of California.

VII

Judgment should be entered in favor of defendant on the merits as to Counts I and II and in favor of defendant as to Counts III and IV without prejudice to plaintiffs' right to file a separate state court action on said Counts III and IV.

IT IS SO ORDERED and counsel for defendant shall submit an appropriate judgment in accordance herewith.

DATED: Jan. 14, 1969

ALAN J. FERGUSON
United States District Judge

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Excerpt from Proceedings of Tuesday, July 21st, 1970

Before: ELY and WRIGHT, Circuit Judges, and JAMESON, District Judge

Order Denying Petition for Rehearing

On consideration thereof, and by direction of the Court, IT IS ORDERED that the petition of Appellants filed July 7, 1970 and within time allowed therefor by rule of court, for a rehearing of above cause be, and hereby is denied.

APPENDIX D

Section 8. Interstate Commerce Act [49 U.S.C. § 8]

"That in case any common carrier subject to the provisions of this part shall do, cause to be done, or permit to be done any act, matter, or thing in this part prohibited or declared to be unlawful, or shall omit to do any act, matter, or thing in this part required to be done, such common carrier shall be liable to the person or persons injured thereby for the full amount of damages sustained in consequence of any such violation of the provisions of this part, together with a reasonable counsel or attorney's fee to be fixed by the court in every case of recovery, which attorney's fee shall be taxed and collected as part of the costs in the case."

Section 9. Interstate Commerce Act [49 U.S.C. § 9]

"That any person or persons claiming to be damaged by any common carrier subject to the provisions of this part may either make complaint to the Commission as hereinafter provided for, or may bring suit in his or their

own behalf for the recovery of the damages for which such common carrier may be liable under the provisions of this part, in any district or circuit court of the United States of competent jurisdiction; but such person or persons shall not have the right to pursue both of said remedies, and must in each case elect which one of the two methods of procedure herein provided for he or they will adopt. In any such action brought for the recovery of damages the court before which the same shall be pending may compel any director, officer, receiver, trustee, or agent of the corporation or company defendant in such suit to attend, appear, and testify in such case, and may compel the production of the books and papers of such corporation or company party to any such suit; the claim that any such testimony or evidence may tend to criminate the person giving such evidence shall not excuse such witness from testifying, but such evidence or testimony shall not be used against such person on the trial of any criminal proceeding."

Section 13a(1). Interstate Commerce Act [49 U.S.C. § 13a(1)]

"(1) A carrier or carriers subject to this part, if their rights with respect to the discontinuance or change, in whole or in part, of the operation or service of any train or ferry operating from a point in one State to a point in any other State or in the District of Columbia, or from a point in the District of Columbia to a point in any State, are subject to any provision of the constitution or statutes of any State or any regulation or order of (or the subject of any proceeding pending before) any court or an administrative or regulatory agency of any State, may, but shall not be required to, file with the Commission, and upon such filing shall mail to the Governor of each State in which such train or ferry is operated, and post in every station, depot or other facility served thereby,

notice at least thirty days in advance of any such proposed discontinuance or change.

The carrier or carriers filing such notice may discontinue or change any such operation or service pursuant to such notice except as otherwise ordered by the Commission pursuant to this paragraph, the laws or constitution of any State, or the decision or order of, or the pendency of any proceeding before, any court or State authority to the contrary notwithstanding. Upon the filing of such notice the Commission shall have authority during said thirty days' notice period, either upon complaint or upon its own initiative without complaint, to enter upon an investigation of the proposed discontinuance or change. Upon the institution of such investigation, the Commission, by order served upon the carrier or carriers affected thereby at least ten days prior to the day on which such discontinuance or change would otherwise become effective, may require such train or ferry to be continued in operation or service, in whole or in part, pending hearing and decision in such investigation, but not for a longer period than four months beyond the date when such discontinuance or change would otherwise have become effective. If, after hearing in such investigation, whether concluded before or after such discontinuance or change has become effective, the Commission finds that the operation or service of such train or ferry is required by public convenience and necessity and will not unduly burden interstate or foreign commerce, the Commission may by order require the continuance or restoration of operation or service of such train or ferry, in whole or in part, for a period not to exceed one year from the date of such order. The provisions of this paragraph shall not supersede the laws of any State or the orders or regulations of any administrative or regulatory body of any State applicable to such discontinuance or change unless notice as in this paragraph provided is filed with the Commission. On the expiration of an order by the

Commission after such investigation requiring the continuance or restoration of operation or service, jurisdiction of any State as to such discontinuance or change shall no longer be superseded unless the procedure provided by this paragraph shall again be invoked by the carrier or carriers."

Section 3. First (i), Railway Labor Act [45 U.S.C. 153. First (i)]

The disputes between an employee or group of employees and a carrier or carriers growing out of grievances or out of interpretation or application of agreements concerning rates of pay, rules, or working conditions, including cases pending and unadjusted on the date of approval of this Act, shall be handled in the usual manner up to and including the chief operating officer of the carrier designated to handle such disputes; but, failing to reach an adjustment in this manner, the disputes may be referred by petition of the parties or by either party to the appropriate division of the Adjustment Board with a full statement of the facts and all supporting data bearing upon the disputes.